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NO. 03-95

IN THE

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA STATE POLICE,

Petitioner

v.

NANCY DREW SUDERS

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

DON BAILEY, ESQUIRE
BAILEY STRETTON & OSTROWSKI
4311 N. 6th Street
Harrisburg, PA 17110
(717) 221-9500

Counsel of Record for Respondent

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QUESTIONS PRESENTED

When a hostile work environment created by a supervisor culminates in a constructive discharge, may the employer assert the affirmative defense recognized in *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)?

PARTIES TO THE PROCEEDING

The petitioner is the Pennsylvania State Police, an agency of the Commonwealth of Pennsylvania.
The respondent is Nancy Drew Suders.

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STATEMENT OF THE CASE

Nancy Suders is a wonderful woman. A local Republican Committee person, Nancy worked for the Sheriff as his Assistant in rural Fulton County, Pennsylvania. A devoted wife and mother, and a recent grandmother, Nancy was encouraged by her County Chairman to apply for an entry level position at the local Pennsylvania State Police (PSP) barracks. She agreed, primarily because she would get a substantial pay increase, and because she was extremely well qualified for the job having worked at a similar job for years. She was told she needed the recommendations of her state senator, Robert Jubalier, an outstanding public official with an impressive record of public leadership and constituent service. Nancy also had the recommendation of the Governors Office having worked in the campaign of then Governor Tom Ridge as an enthusiastic party loyalist. No political hack, Nancy was extremely well qualified and she enjoyed the enthusiastic support of all who knew her. She was, and is, a decent, honest citizen, and, now back in the Fulton County Sheriff's Office as a deputy, she continues as an exemplary public employee.

As soon as Nancy begun working at the PSP barracks she was under assault. She was subjected to some of the most egregious misconduct imaginable in a sexual harassment case. Virtually all of her supervisors participated in abusing her. She had no one to go to. She was subjected to filthy, unwelcome jokes, one of her supervisors would roll up to her, as she worked, in his office chair, wearing spandex shorts, and lean back, putting his hands behind his head, while thrusting his legs forward which he would spread

apart. The obvious invitation was to engage in oral sex. Another of her supervisors was enamored of TV Wrestling. He would periodically jump up, and, crossing his arms stiffly in front of him, grasp his privates in his hands, and scream "suck it". Another supervisor fancied himself a Nazi Storm Trooper look alike, of which he was proud. His specialty was treating Nancy as if he were a dictator – being authoritative to intimidate Nancy Suders and frighten her. Nancy began to look for help. She had no one to go to at her barracks work site, no one to talk to. Consequently, she contacted the Pennsylvania State Police Department Affirmative Action/Discrimination Officer Major Virginia Smith Elliot. Elliot was not only insensitive; she was antithetical to her appointed duties and to Nancy's rights and interests. She not only ignored Nancy's overt pleas for help she wouldn't even fax her a form she told Nancy was needed, even after Nancy told her she could find no form anywhere at the Barracks. Smith- Elliot did not merely avoid Nancy. She never asked a question, followed up, or let Nancy make even an oral report. Merely offering to fax Nancy the supposedly needed form would have helped, but Smith Elliott couldn't be bothered to do that, even though it was the second time Nancy Suders told her she needed help.

While the harassment went on, Nancy Suders also applied to take a test, on her own initiative that would have made her eligible for another job at a larger Barracks, which, although a long drive away, would have meant more money. Most important it would have meant freedom from her abusers. It is important to note that two other woman worked at the Barracks. Young and attractive they were personally

close to the supervisors. They had been chosen by the supervisors for their jobs, and one, the one with the most seniority, was seen in the embrace of Mr. Easton by Nancy personally when she arrive for her shift one evening. In short, the supervisors had other people whom they
wanted to put in Nancy's job, and they had other people for the job Nancy was applying for. Lastly, Easton was unhappy with Nancy because she advised him she had no "pull" and could not help his son get a job that Easton wanted. That had occurred early on when Nancy, who had been recruited for the position by her County Chairman had demonstrated recommendations that apparently impressed Easton, who erroneously thought Nancy was a person who had great political influence, which she did not.

When Nancy asked if any word had come back on her application (she had taken a test that went with the application) she was put off by the supervisors. She then realized something harmful to her was going on and she became even more fearful.

While at work, she went back to use the ladies restroom. She noticed one of the drawers ajar on a dresser that was in the room (along with a bed). As she glanced down she also saw what appeared to be a manila envelope. She opened the drawer and saw the envelope her job application was in, along with lingerie and women's bikini underwear and lace bras. Nancy removed her application and took it to copy it.

As it was, she could not return it immediately. When she did, she put it in the drawer and turned to use the commode. Later, as she washed her hands they turned blue. Her supervisors had set her up putting "theft powder" all over the bathroom. When in contact

with moisture it turns a bright blue. They even put it on the toilet seat.

Her supervisors held Nancy against her will at the Barracks. They threatened her with arrest and criminal charges. For days, after looking everywhere for help, Nancy had carried around a letter of resignation in her purse because she couldn't take the harassment, hoping to get another job elsewhere. But her PSP supervisors had lied to her about her test and application. Nancy insisted she be freed, she was alone and frightened, so she gave her inquisitors to take the resignation letter. They let her go.

Nancy Suders later filed suit. The District Court found that Nancy Suders failed to take advantage of the PSP policy to help herself fight discrimination. Suders argues that there was no PSP policy (contrary to Petitioners suggestion that the policy was posted – it wasn't). On these grounds the District Court found that the PSP was entitled to relief (the Court said they had a policy and that Nancy failed to take advantage of it). Nancy appealed and the Third Circuit reversed.

SUMMARY OF THE ARGUMENT

A constructive discharge being classified as a tangible employment action is consistent with the holding of *Ellerth/Faragher*, which arguably would not make sense without such a holding, but which further the reasonable parameters of employer responsibility and the commensurate duty to prevent constitutional violations, as per Title VII of an employers supervisors, the very intent of the law.